

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 99-208

September 2, 1999

PUBLIC UTILITIES COMMISSION
Proposed Amendments to Chapter 520
Unscheduled Tour, Charter and Water
Taxi Services in Casco Bay

ORDER ADOPTING RULE
AMENDMENTS AND
STATEMENT OF FACTUAL
AND POLICY BASIS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. INTRODUCTION

In this Order, we adopt amendments to Chapter 520 of the Commission's rules. The purpose of the amendments is to provide more flexibility for providers of charter and water taxi services while maintaining the distinctions between these services and ferry service to the Casco Bay Islands. The amendments also make minor changes to the organization of the rule.

II. BACKGROUND

In our final order in *Old Port Mariner Fleet, Inc., Complaint Regarding Casco Bay Island Transit District's Tour and Charter Service*, Docket No. 98-161 (December 11, 1998) (hereinafter referred to as "Old Port Mariner"), we found that the requirement in Chapter 520 that a charter provider stay with its passengers that disembark on one of the Casco Bay Islands served by the Casco Bay Island Transit District (CBITD or District) creates an unfair advantage because the CBITD drops its charter service passengers off on the Regulated Islands and allows them to return on the District's scheduled ferry service. We stated in that Order that we would open a rulemaking to address this provision of Section 520.

We also took this opportunity to reexamine the appropriateness of some of the current rule's other restrictions on tour, charter and water taxi services. The purpose of Chapter 520 is to ensure that regulated ferry service, such as that provided by the CBITD, remains distinct from such competitively offered services as tour, charter, and water taxi service. Our purpose is not to regulate the rates of competitively offered services.¹ Therefore, in our rulemaking we questioned the current rule's imposition of price floors on competitively offered services. As discussed below, the amended rule allows more flexibility in the prices charter and water taxi operators may charge.

¹Section 5101-E of Title 35-A requires the Commission to adopt rules "governing unscheduled tours, charters and water taxi services." This provision does not indicate that the Commission is required to regulate the rates of such entities.

III. RULEMAKING PROCESS

On April 13, 1999, we issued a Notice of Rulemaking which set a hearing date and a deadline for comments pursuant to 5 M.R.S.A. § 8052. The Notice was furnished to CBITD and all charter and taxi operators authorized to provide service between the mainland of Cumberland County and Peaks Island, Great Diamond Island, Little Diamond Island, Long Island, Chebeague Island or Cliff Island. See 35-A M.R.S.A. § 5101.² The Casco Bay Transit District (CBITD) filed preliminary comments and participated in the hearing. The CBITD also filed supplemental comments after the hearing. The Public Advocate also participated in the hearing. Neither Old Port Mariner Fleet (Old Port Mariner) nor any other charter provider or taxi provider filed comments or participated in the hearing.

IV. DISCUSSION OF AMENDMENTS

A. Section 1: Definitions

The amendments change the definitions of charter and water taxi service by limiting these definitions to descriptions of the services provided and removing from the definitions restrictions and price limitations on the services. The amended rule contains separate sections to address restrictions on the provision of charter and water taxi services. No comments were received on these proposed changes.

The amended rule continues to describe water taxi service as an on-demand, unscheduled, one-way passenger service. In our Notice of Rulemaking, we questioned whether water taxi providers should be limited to providing only one-way service. Specifically, we questioned whether the "one-way" requirement is necessary to distinguish water taxi service from ferry service or charter service. We invited comment on this question. In its initial comments, the CBITD objected to the elimination of the one-way requirement, expressing concern that it would allow water taxi operators to provide round-trip packages that might compete with the District's ferry service. In its supplemental comments, the CBITD focused on the proposed rule's elimination of the price floors. We maintain the "one-way" service requirement because it provides an additional distinction between ferry and taxi service and because it does not impose a significant restriction upon taxi providers. The one-way restriction, for example, does not prevent a taxi operator from providing service in one direction and providing return service. It simply requires that the taxi service provider charge separately for each direction.

²This section of the statute specifies the territory of the Casco Bay Island Transit District. The rule collectively refers to the list of islands listed above as "Regulated Islands." We will use that term in this Order to describe the islands to which regulated service applies.

In addition, the revisions eliminate the definition of minimum tariff. Any remaining limits on pricing are now in Section 5 of the amended rule. We discuss these changes below.

The amended rule also eliminates the word “unscheduled” from the definition of tour service. As a practical matter, tours may be offered on a scheduled basis. Thus, defining tour service as “unscheduled” may be inaccurate. Moreover, the word “unscheduled” is not needed to differentiate tour service from ferry service. Tour service, by definition, does not stop at any of the regulated Islands or the mainland except for the point of origination of the tour. Thus, tour service does not compete with transportation service such as that provided by CBITD.

Finally, the amended rule adds a definition for passenger service, which includes a reference to the hand luggage of passengers. Since the definitions of charter service and water taxi service in the amended rule refer to passenger service, we eliminate in those definitions the specific references to hand luggage. No comments were received on this proposed change.

B. Section 4: Limitations on the Provision of Charter Service

Section 4(A) contains the provision formerly in the definition of charter service prohibiting charter service providers from selling individual tickets for any charter trip. This provision is important for maintaining the distinction between ferry service for which individual tickets are sold and unregulated charter service. The original rule also provided that "no individual person shall be solicited. . . for any charter trip." We eliminate this provision because we believe that the prohibition on selling individual tickets adequately addresses the concern that charter providers are not carrying out the same function as ferry service providers. We have added the term "or fares," however, to the provision prohibiting the selling of individual tickets so that it is clear that charter service providers may not offer a fare-per-person service even if they do not actually sell tickets.

The CBITD suggested that the rule should require that charter operators charge either a flat rate per hour or a flat rate per trip. We do not believe that a flat-rate requirement is necessary or desirable for charter providers. The charter provider may have several different rates based on the size of the boat used or other characteristics of the charter.³ The rule should not place unnecessary restrictions on pricing based on the characteristics of the charter as long as the charter service is sufficiently distinct from the ferry service. We believe that the amended rule's prohibition on individual tickets or fares is sufficient to ensure that charter operators offer a service sufficiently distinct from the ferry service.

³We note that the CBITD offers several different types of charters based on day of the week and type of event, such as Fourth of July Charters and Chem-Free School Charters.

Section 4(B) expands the options available to a charter provider whose passengers disembark on one of the Regulated Islands. The original rule required that the vessel used to provide charter service remain dedicated to that charter. The only reason for the original rule's requirement that the charter vessel remain with its passengers was a concern about encouraging "free riders" on the CBITD ferry return service. This could occur if charter service providers dropped their passengers off on the Regulated Islands and encouraged them to return on the CBITD ferry. Because CBITD does not collect fares or tickets on the return trip, its operators have no way of knowing whether a passenger is a CBITD passenger or a passenger from a charter provider or water taxi service. However, we found in *Old Port Mariner* that the CBITD charter service vessel does not remain with its own charter passengers; instead, CBITD charter passengers are allowed to return on the CBITD ferry. *Old Port Mariner* at 33. Through this practice the CBITD has the opportunity to maximize the utilization of its charter boats by dropping passengers off and using the same boat for additional charters. The current rule does not afford charter providers the same opportunity. Thus, under the current rule, the CBITD has an advantage over other charter providers.⁴

We are concerned about the fairness of a provision that restricts a competitive service in order to accommodate the business practices of a regulated entity. We find it even harder to justify the restriction when the charter service provided by that regulated entity -- the CBITD -- does not comply with the rule's "stay with the passengers" requirement.

Thus, in Section 4(B) of the amended rule, we provide charter providers three alternatives to remaining with the passengers. A charter provider may return to pick up its charter service passengers or contract with the CBITD or another charter provider to provide passenger return service. Additionally, a charter provider may offer passengers the option of returning with the ferry if this arrangement has been agreed to between the CBITD and the charter provider. We expect that the CBITD will not unreasonably refuse to enter into a contract for provision of return service to a charter provider's passengers. In Section 4(C), the amended rule requires charter providers to maintain inbound and outbound passenger counts for each trip until the end of the year following the year which the trip occurred.

The CBITD expressed concern about the possibility of "free riders" resulting from these expanded options. Because the CBITD does not collect tickets for return service, any person may take return service on the ferry even if that person did not buy a round trip ticket in Portland. Thus, "free riders" are not limited to charter passengers, but also may be persons who took a taxi or noncommercial transport to one of the Regulated Islands. In its comments and at the hearing, the CBITD expressed a strong

⁴Although CBITD charter service should be subject to requirements applicable to charter providers, we did not specifically find in the *Old Port Mariners* case that the CBITD acted in violation of Chapter 520.

disinclination to change its current fare collection practice by requiring a return ticket or by issuing a two-part ticket. It did acknowledge, however, that it expected and did not object to a certain level of "free ridership" as a result of its ticket collection practice.

Although the CBITD acknowledges that there is a certain level of free ridership, it expressed concern about the impact of any change in the charter requirements on its ability to serve its paying ferry customers. It suggested additional requirements for charter providers that provide only one-way service. Specifically, the CBITD suggested that charter companies seeking to have the CBITD provide return service be required to provide advance notice for CBITD planning purposes and pay a rate-per-passenger equal to 1/2 the round trip price for service to the island from which return service is requested. The CBITD also stated that the operator should provide the CBITD with a passenger count, which, subject to modification before the trip leaves, will be the passenger count for billing purposes as well.

While these suggested additions to the rule appear to be reasonable terms for the District's contract with charter operators, we do not see a need to include them in the rule.⁵ The parties should be free to develop reasonable contract terms for the provision of return service by the CBITD. Therefore, we have not added these suggested provisions to the rule.

The CBITD also states that charter providers should not be allowed to provide one-way service for some passengers and round-trip service for other passengers. The CBITD is concerned that a charter provider offering round-trip service may tell his or her customers that if they want to return earlier or stay longer, they can simply take a CBITD ferry instead of returning with the charter provider. According to the CBITD, "too much flexibility transforms charter service into 'transportation service.'" The CBITD is also concerned that it will not be able to get accurate counts from the charter providers. Additionally, the CBITD suggests that every charter company should be required to file annually a certificate attesting to its compliance with the requirements of Chapter 520 during the proceeding year. Finally, the CBITD suggests that the charter providers should be required to retain records of passenger counts for at least three years to allow verification that the provider is complying with the rule.

We do not agree with the CBITD that allowing charter providers to give their passengers the option of returning with the ferry transforms these providers into "transportation providers." As described above, CBITD allows passengers to disembark and return on the CBITD ferry. This practice does not transform the CBITD charters into a ferry service and will not do so for its competitors. However, CBITD charters

⁵We would not expect the CBITD to refuse to enter a contract with a charter operator on the pretext that it does not have sufficient capacity, especially if it is providing return service to its own charter passengers. Rather, we understand that the purpose of advance notice is so that the CBITD can plan its scheduled trips in order to accommodate reasonable requests for return service.

have a distinct advantage over other charter providers unless these other charter providers have a similar option. We also are unpersuaded that allowing other providers to give their passengers the same option as CBITD currently has will result in lost revenue to the CBITD. The rule requires that charter providers may only take advantage of this option if they have a contract with the CBITD.⁶ The determination of the fee for such an arrangement would be left for negotiation by the parties. We would expect the District not to refuse to enter into a reasonable contract for the provision of such a service. In our view, a contract that provides 15 or fewer passengers per charter the option of returning with the ferry would be reasonable.⁷ Finally, the requirement to maintain records of inbound and outbound passenger counts will aid in enforcement of the rule. We do not adopt the District's suggestion that charter providers certify their compliance with Chapter 520. Title 35-A provides various enforcement mechanisms including monetary penalties for non-compliance with Commission rules. Therefore, the certification requirement is unnecessary.

C. Section 5: Limitations on the Provision of Water Taxi Service

This section replaces the requirement of a minimum tariff with the requirement of a flat rate based on the origination and termination points regardless of whether there are fewer than six passengers. We discuss the elimination of the minimum tariff for charter and water taxi service below.

⁶For, example the parties may agree that the charter provider should pay a fixed amount per month or per season based on a projection of how many riders per trip on average would take advantage of the option to return with the ferry. The advantage of this arrangement for the District is that it has a guaranteed stream of revenue even if passengers do not avail themselves of the option. For the charter providers, it provides the service at a fixed price that they can use in determining their rates and marketing strategies. Both parties would take a certain risk that the number of passengers taking advantage of the option exceeds or is below the projected amount. The parties could also agree to a true-up mechanism based on the actual number of passengers.

⁷The rule does not specifically address the situation in which a small number of passengers of a charter operator that does not have a contract with CBITD may elect to return by ferry even though this option is not offered by the charter operator. The District testified that it currently does not try to recover revenue in such situations and that it would continue to absorb the lost revenue as long as the number of "free riders" remained low.

D. Elimination of Minimum Tariff for Charter and Water Taxi Service

The amended rule eliminates the price floors for charter providers and replaces the minimum tariff requirement for taxi service with a requirement to charge a flat rate regardless of whether the water taxi carries the maximum number of passengers. We eliminate the minimum tariff because we believe such rate regulation of competitive charter and water taxi service is unnecessary.

When we originally adopted Chapter 520 in 1993, we were concerned that without minimum charges, charter providers and water taxis might compete with the service offered by the CBITD. *Public Utilities Commission, Unscheduled Tour Charter and Water Taxi Services*, Docket No. 92-264, Order Adopting Rule and Statement of Factual and Policy Basis (January 28, 1993). However, we conclude that the definitions of charter service and water taxi service are sufficiently distinct from the ferry service offered by the CBITD to address such concerns. Moreover, the tariffs filed by charter providers indicate that such providers price their service very differently than CBITD's ferry service. For example, rate schedules filed by charter providers indicate that the average charge for charter service is approximately \$150 per hour.⁸ This pricing indicates to us that it is unlikely that charter providers could efficiently charge rates comparable to the per-passenger fares offered by the CBITD's ferry service.

For water taxis, we have replaced the minimum tariff requirement with the requirement that water taxi service be provided at a flat rate based on the origination and termination points, regardless of whether the vessel carries fewer than six passengers, the maximum number allowed under the rule. In addition, we have added a provision that if a water taxi provider changes its rate, it is required to file a revised tariff sheet at the Commission. A price sheet that the provider makes available to its customers will satisfy this requirement. The final amendments clarify that the same flat rate applies whether the trip is inbound or outbound.

We eliminate the price floors because we are not convinced that a water taxi provider can or would compete with the ferry service. Although the CBITD requests that we maintain the price floors, it acknowledges that taxis "can (and undoubtedly will) charge more than the minimum rate." The CBITD suggests that retaining the price floors "clarifies the 'premium' nature of water taxi service and helps provide a clear distinction between such service and the Transit District's service." Finally, the CBITD states that the restrictions on water taxis should not be changed because the water taxis support these provisions and the provisions "are consistent with the economic incentives of the market."

⁸Cf. CBITD's round trip fare of \$8.60 for one adult to Cliff Island (the highest of the adult fares to the Regulated Islands).

Given the District's assertion that the water taxis will charge more than the minimum rate, it is hard to justify a minimum rate. If taxis charge more than the minimum rate, it seems unlikely that they provide a service that competes with the CBITD. In fact, other restrictions distinguish the water taxis from ferry service. Water taxis provide on-demand, unscheduled service and may carry no more than six passengers. In addition, the flat rate requirement places some constraints on water taxi pricing. If a water taxi operator charges a significantly lower flat rate, that rate will apply whether he or she serves one or six customers. Thus, the operator risks a significant loss of revenue. Even if the water taxi operator's costs are low enough so that he or she could cut his or her prices significantly, we question whether such pricing would be in the water taxi operator's best interest.

In our original rulemaking, we found that the minimum charge also would provide an efficient means of resolving any disputes regarding compliance with the rule.⁹ We stated that there would be a presumption that by-pass of ferry service had not occurred if a charter or water taxi operator charged the minimum tariff. The reason for the presumption was that there would be no financial incentive for such by-pass as long as the operator could not charge rates below that of the District's ferry service. Based on the rulemaking record, we cannot conclude that there will be a strong financial incentive for by-pass in the absence of the minimum rate. If we find that this incentive does exist because water taxis lower their rates significantly, we may consider reinstating the price floors. In order to provide some information on which to base any future action, we require water taxi operators to file changes in their rates at the Commission. These rate schedules will not be subject to our approval.

Accordingly, it is

ORDERED

1. That the attached Chapter 520, Unscheduled Tour, Charter and Water Taxi Services in Casco Bay, as amended, is hereby adopted;
2. That the Administrative Director shall file copies of this Order and attached rule with the Secretary of State; and
3. That the Administrative Director shall send copies of this Order and attached rule to :
 - a. Providers of waterborne transportation, charter, taxi and tour services to the Regulated Islands which currently have tariffs on file at the Commission for the provision of such services; and

⁹In this earlier rulemaking, we originally proposed the minimum tariff as a possible alternative to the proposed rule which did not contain a price floor.

- b. All persons who have filed with the Commission within the past year a written request for Notice of Rulemaking.

Dated at Augusta, Maine, this 2nd day of September, 1999.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Nugent
 Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.